Lee v. Kemna: Federal Habeas Corpus and State Procedure

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Vicki C. Jackson[1]
Thurgood Marshall Professor of Constitutional Law

Many of the Supreme Court's cases involving the federal habeas claims of prisoners convicted in state court in the years since the Warren Court find that the prisoner's constitutional challenge cannot be heard on the merits for one or more threshold reasons, often of procedure. In academic debate, some argue that habeas corpus for state-court-convicted prisoners "cannot be justified as a case-by-case remedy for individual violations of federal constitutional rights."[2] *Lee v. Kemna*, 534 U.S. 362 (2002), holding that a federal habeas petitioner's constitutional challenge to the basic fairness of his trial could and should be heard by the federal district court sitting on his federal habeas corpus petition, is a departure from the larger pattern. It is restorative of an understanding of federal habeas corpus as a valuable, if in some respects "redundant," check on unconstitutional conduct leading to severe deprivations of human liberty; its reasoning is tempered by an appreciation of the importance, and the challenges, of judges exercising sound judgment in making and reviewing procedural decisions in criminal cases.

Charged with having participated in a first-degree murder in Kansas City in August 1992, at his state court trial Lee sought to present an alibi defense that he was in California at the time of the murder. Three members of Lee's family had come from California to testify that he had been visiting with them in California during this period. During his trial, which spanned only three days, there was considerable discussion of the alibi defense. The defendant's lawyer told the jury during voir dire, and again in his opening statement, that they would hear the defendant's alibi witnesses;[3] an alibi charge was discussed by both counsel with the judge. On the third day of

trial, the three family members were sequestered in a room at the courthouse first thing in the morning, and they were there at the morning recess. However, at the lunch recess they were not there and could not be located.

Following the brief lunch recess, Lee sought a brief adjournment to find his witnesses, who were under subpoena. Out of the presence of the jury, Lee testified that he had seen them in the courthouse that morning, first thing, and again at the morning recess, that he did not know where they were, and that he could not telephone his uncle's home because it had no phone; he also said that he believed the witnesses were in town because they had come to testify for him and had plans to engage in "some ministering" in town that evening. *Id.* at 369. However, as the Court explained, "[t]he trial judge denied the motion, stating that it looked to him as though the witnesses had 'in effect abandoned the defendant' and that, for personal reasons [(his daughter's hospitalization)], he would 'not be able to be [in court the next day] to try the case.'" *Id.* at 365-66 (third alteration in original). The trial court judge indicated that further delay would not be possible, because "he had 'another case set for trial' the next weekday." *Id.* at 366. The trial resumed "without pause," and without the testimony of Lee's alibi witnesses. *Id.* Both defense and prosecution referred to the absent witnesses in their closings; the jury convicted Lee after deliberating three hours, and he was sentenced to life. *Id.* at 370-71.

Lee's motions for a new trial, and his motion for post-conviction relief on this issue in the state courts, were denied (the post-conviction court concluding that such trial errors were reviewable only on direct appeal). *Id.* at 371. On his consolidated appeals, the Missouri appellate courts refused to address the merits of his federal constitutional claim that the court's failure to allow time to find the witnesses deprived him of his constitutional due process rights. *Id.* at 371-73. The state appellate courts relied, not on the reasons stated by the trial judge, but on two rules of procedure, requiring that motions for continuance be made in writing and that they contain representations (e.g., about what the missing witnesses would say and the defendant's diligence in his efforts to procure their testimony), which Lee, the appellate court said, had not complied with. *Id.* at 372-73.

The federal district court, to which Lee turned for federal habeas relief after exhausting his state court remedies, held that the state court's judgment rested on an independent and adequate procedural ground barring review in habeas corpus. *Id.* at 374.[4] The Eighth Circuit affirmed, in a very brief per curiam opinion, finding that Lee had procedurally defaulted his claim. *Lee v. Kemna*, 213 F. 3d 1037 (8TH Cir. 2000). Chief District Judge Mark Bennett, sitting by designation, wrote a substantial dissent. *Id.* at 1039-49.

Justice Ginsburg's opinion for the Court agreed with Chief Judge Bennett's dissent that the state court judgment did not rest on an adequate state procedural ground. The case was remanded for a merits decision on the habeas corpus petition in the federal district court. After reviewing the alibi witnesses' testimony in videotaped depositions, the District Judge granted the writ of habeas corpus, vacating the conviction. *Lee v. Kemna*, 2004 U.S. Dist. LEXIS 13356 (W.D. Mo. 2004) (vacating and permanently setting aside the conviction and sentence unless a new trial was begun within 90 days). The District Judge (the same judge who had previously denied Lee's habeas corpus petition) concluded, in a reasoned opinion, that "a recess was required by due process, on the record as articulated, and that petitioner had and has three generally credible witnesses for an alibi defense."[5] *Id.* at *17.

Justice Ginsburg's opinion for the Court in *Lee v. Kemna* is one I have always enjoyed teaching in Federal Courts, for four reasons.

First, *Lee v. Kemna* belies the idea that cases meriting Supreme Court review will necessarily arrive with all the "bells and whistles" of a major public law dispute. No experienced Supreme Court litigators sought certiorari here; nor was there an obvious circuit conflict. The Eighth Circuit had written a very brief per curiam affirmance of the district court's dismissal of the habeas petition, notwithstanding a long, and strong, dissent by a district court judge sitting by designation. And petitioner Lee was able to obtain justice at the Supreme Court despite his having to represent himself at numerous critical stages, including in his petition for certiorari. (As the Court notes, Lee also had to proceed pro se initially in his

state post-conviction proceedings, 534 U.S. at 371, and again in filing his petition for habeas corpus relief in the federal district court, *id*. at 373.) The Supreme Court is both "supreme" and a "court." As a "supreme" court, it necessarily cannot sit as a court of errors to correct all mistakes of federal law in the lower courts, state and federal; but as a "court," hearing claims of serious injustice, even in an otherwise "small" case, it can appropriately affirm the link between justice and judging.

Second, the opinion illustrates the importance of the facts and the impact of factual circumstances on individual behavior, in litigation (as elsewhere). One of the signal features of common-law systems of adjudication has been a focus on the facts, and this closely reasoned opinion is well grounded in the Justice's evident respect for facts and the record. She writes, for example, that the record revealed no support for the trial judge's assumption that the witnesses, who had come from California, had simply abandoned the defendant. *Id*. at 381 (agreeing with the dissenting judge in the Eighth Circuit that there was not a "'scintilla'" of evidence supporting that supposition).[6] The dissent, by contrast, hypothesized that the alibi witnesses may have had "second thoughts" about testifying and possibly committing perjury, in light, inter alia, of the prosecution's evidence; the dissent also suggested that defense counsel had perhaps decided to abandon the alibi defense, fearing its collapse. *Id*. at 402-03 (Kennedy, J., dissenting). Justice Ginsburg rebutted both arguments from further consideration of the record and the "realities of trial." *Id.* at 381 n.12. When these three witnesses were finally heard by a judge (two years after the Supreme Court's decision), that federal district judge—who had previously denied relief—concluded that the witnesses were "very credible."[7] Given the finding of the witnesses' general credibility (and their willingness to testify by deposition in the habeas proceedings that followed the Supreme Court's decision), Justice Ginsburg's reading of the factual record appears to be more accurate as to the facts accounting for the witnesses' disappearance. In opinions across areas including gender equality, race equality, and reproductive freedom, Justice Ginsburg's attention to the facts is a welcome font of common-law judicial sensibility.

Third, the opinion reflects a willingness to empower appellate judges to identify "exceptional" cases involving "exorbitant application" of rules, and to make the judgments such a standard requires. The Court explained that there are "exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question" and concluded that this was such an exceptional case. *Id.* at 376. In a sense, this standard is one that involves trusting judges to decide when literal compliance with written rules should not bar consideration of claims. While it may seem strange to talk about trusting judges (given that the trial judge's ruling was found to be in error), the Court's decision is, in a sense, brave enough to trust the appellate process to recognize truly "exorbitant" applications of otherwise sensible rules. Such a willingness to allow recognition of "exorbitant" or grossly undue application of valid rules runs against the grain of a formalism that, as Justice Frankfurter put it in his *Staub* dissent, favors enforcing rules even when "the reason for the rule does not clearly apply." *Staub v. City of Baxley*, 355 U.S. 313, 333 (1958) (Frankfurter, J., dissenting). And, it ventures beyond the apparent protection that formalist adherence to rules offers those who are judges, by insisting that some further element of judgment may be called for. Application of such a standard plainly depends on trust in the judgment of other judges. A standard that involves trusting judges to distinguish exorbitant from other applications of legitimate rules may be understood as expressing a commitment to the justice-seeking role of being a judge. But, if not wisely used, it might pose a potential threat to the orderly application of procedural rules to produce legitimately stable decisions; condemning an exorbitant application of a procedural rule in one case might lead to condemning a less exorbitant application in another (by following a broadly stated principle attributed to the first case). This brings me to my last point.

This opinion indicates that constitutional values of procedural justice can be vindicated without threat to state procedural systems. The decision in *Henry v. Mississippi*, 379 U.S. 443 (1965), concerned some judges and scholars, insofar as they believed it opened the door (on direct federal

review) to second-guessing of the need to apply legitimate rules of procedure in the state courts. *Lee v. Kemna*, however, is carefully cabined, repeatedly emphasizing its own limitations.[8] The Court did not simply say this at a general level, but gave three reasons that "in combination" explained why the case was special and the state court application of procedural rules "exorbitant": The reasons given by the trial judge could not have been affected by perfect compliance with the procedural rules; the Missouri rules had never been applied in a case as unusual as this, where subpoenaed witnesses, who had been present in the courthouse the very day of their planned testimony, mysteriously disappeared (on the last day of trial); and finally, "given 'the realities of trial,' … Lee substantially complied with Missouri's key Rule," by virtue of Lee's testimony that day and the information about the alibi witnesses repeatedly presented to the court over the three days of the proceedings. *Id.* at 381-85. An ultimately successful due process claim, never heard by the state appellate courts, nor the federal habeas court prior to the Supreme Court's decision, was thus allowed to be heard and federal constitutional rights vindicated in the federal habeas corpus proceeding after the Supreme Court's decision.

Would it have been better had the state appeals courts heard the federal constitutional question in the first instance? Undoubtedly so. But this opinion invites the state court system to continue to develop and enforce procedural rules to assure the orderly conduct of trials, and trusts them—appellate as well as trial judges—to apply those rules with sensitivity to the possibility that on rare occasions an application will be so exorbitant that adherence to the procedural values of our constitutional justice system should allow adjudication on the merits. It invites state court judges, too, to share in the responsibility of judgment, to avoid such exorbitant applications in the future.

In 2004, David Shapiro wrote that *Lee v. Kemna*, like others of Justice Ginsburg's decisions, "evince[s] a pragmatism emphasizing the particular context and focusing on what works best in that context in the interests of both judicial efficiency and fairness to litigants."[9] Professor Shapiro described *Lee v. Kemna* as one of his "favorites." Mine too.

Endnotes

1 With thanks to Richard Fallon and Judith Resnik for very helpful comments, and to Molly Jennings for able research assistance. Any errors are, of course, my own.

2 Joseph L. Hoffman & Nancy J. King, *Right Problem, Wrong Solution,* 1 Cal. L. Rev. Circuit 49, 50 (2010).

3 During his opening statement to the jury, "defense counsel said three close family members would testify that Lee came to visit them in Ventura, California, in July 1992 and stayed through the end of October. Lee's mother and stepfather would say they picked him up from the airport at the start of his visit and returned him there at the end. Lee's sister would testify that Lee resided with her and her four children during this time. All three would affirm that they saw Lee regularly throughout his unbroken sojourn." *Lee v. Kemna*, 534 U.S. at 367-68.

4 The district court also held at that time that affidavits from the three witnesses could not be considered because they had not been offered to the state courts. *Id.* at 374.

5 *See Lee v. Kemna*, 2004 U.S. Dist. LEXIS 13356, at *12 ("Unlike some cases involving family witnesses, the three in this case testify in a very credible manner, and I doubt that a jury would view them as willful perjurers."). The District Court also felt there were weaknesses and deficiencies in their testimony but that the jury could have been persuaded that Lee was in California at the time of the murder. *Id.* at *12, *15. *See also id*. at *2 (stating that the witnesses' depositions had been taken).

6 S*ee* 534 U.S. at 373 n.6 (noting that all three witnesses had previously indicated, in essence, that a court officer had informed them, midday, that their testimony would not be needed until the next day).

7 See above at note 5. To be sure, there remains a mystery about who told the court official to tell the family that they could leave. The district court judge found no evidence that the prosecution had done so, but engaged in what he called "speculation" about whether defense counsel himself (at odds with the defendant and acting "disingenuous[ly]") may have done so. *Lee v. Kemna*, 2004 U.S. Dist. LEXIS 13356, at *15-16 & n.8.

8 Whatever else might be said, it would be difficult to argue that the state court's application, in *Henry*, of the "contemporaneous objection" rule was "exorbitant," and the majority in *Henry* did not so argue. *See* 379 U.S. at 449 (indicating that where "enforcement of the [state procedural] rule … would serve no substantial state interest," it would not bar review of the federal claim).

9 David L. Shapiro, *Justice Ginsburg's First Decade: Some Thoughts About Her Contributions in the Fields of Procedure And Jurisdiction*, 104 Colum. L. Rev. 21, 26 (2004).